Supreme Court, U.S.
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No. 92-1978

In The

Supreme Court of the United States

October Term, 1992

RESERVE NATIONAL INSURANCE COMPANY,

Petitioner,

v.

RAY CROWELL AND MYRTLE CROWELL,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Alabama

BRIEF OF RESPONDENTS RAY CROWELL AND MYRTLE CROWELL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

1. Whether the Supreme Court of the United States should grant a Petition For A Writ Of Certiorari to the Supreme Court of Alabama when the Supreme Court of Alabama has carefully examined the trial court's analysis of the punitive damage verdict and then affirmed the trial court's opinion to remit the punitive damage verdict from one million dollars to $600,000?

2. Whether the Supreme Court of the United States should grant a Petition For A Writ Of Certiorari to the Supreme Court of Alabama because the Supreme Court of Alabama refused to adopt a "punitive damage" to "actual damage" ratio and apply such a ratio to this case?

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STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Ray Crowell, who is 74 years of age, is married to Myrtle Lettie Crowell, 68 years old. They have been married for over 52 years and live in Dozier, Alabama. They have four children, one of whom is Dorothy Ziglar. Ray is totally disabled and has drawn social security benefits since approximately 1967. Myrtle has only an eighth grade education, although she did get her GED.

Reserve National is an insurance company headquartered in Oklahoma City, Oklahoma that primarily targets (its sales efforts at) people living in rural areas. Reserve National targets the rural elderly in Alabama for the sale of medicare supplement insurance policies.

Phillip Bailey was a licensed agent of Reserve National on September 2, 1988. Bailey has had years of experience in the insurance industry. Bailey has been hired and terminated by Reserve National on three different occasions. Each of his terminations was based on his failure to sell enough insurance policies. Bailey was rehired a third time by Reserve National on February 23, 1990 *after* the frauds proven in this lawsuit had been brought to the attention of Reserve National.

Bailey was trained by Reserve National to sell medicare supplement policies. He understood the procedures to follow as established by the company. He worked only as a "captive agent" for Reserve National while employed by them. Bailey had a certain quota of sales (established by the company) to meet each month. He had to collect a minimum of $800 in premiums a week, or Reserve

National would terminate him. Although Bailey has sold the particular Reserve National medicare supplement policy (at issue in this suit) to approximately 60 people, he has not read the policy from beginning to end. Reserve National has not disciplined Bailey for his failure to read the policy that he is selling to elderly people. Bailey knows how to fill out a medicare supplement policy application because he was instructed by Reserve National on how to do it and because he has done it many times. Bailey sold a Reserve National medicare supplement policy to the Crowells on September 2, 1988 at a time when the Crowells had existing medicare supplement coverage with Liberty National Life Insurance Company.

Of significant importance is Bailey's knowledge of Alabama law requiring the agent and his insurance company to complete a "replacement form" when selling a medicare supplement policy which "replaces" an existing medicare supplement policy. Pursuant to Regulation #71 Section 5 of the Alabama Department of Insurance, (Plaintiff's Exhibit #23):

> An insurer, within five working days from the receipt, at its policy issuance office, of an application for medicare supplement insurance in replacement of a previously issued policy, shall furnish to the insurer whose policy is being replaced, a copy of the replacement notice . . .

Without dispute, Bailey and Reserve National were aware of this regulation. No replacement form was ever completed by the Defendants, given to the Crowells, or sent to Liberty National.

The importance of the replacement form is that it tells customers that there may be "pre-existing conditions" that are not covered under the policy to be issued. It also tells customers that they probably need to call their agent (with the company whose policy is to be replaced) so that he will have an opportunity to make a fair comparison of the two policies.

Joseph D. Cope, an agent for Liberty National, was servicing the Crowells' policies with Liberty National in 1988. If a replacement form had been filled out by Reserve National's agent and forwarded to Liberty National, then Cope would have eventually gotten notice of the proposed replacement. Upon receiving the replacement form, Cope would have contacted the Crowells, met with them, and compared the Liberty National and Reserve National policies. He would have tried to convince them to keep the Liberty National policy that they already had. However, Cope did not receive any notice of the replacement of the Crowells' Liberty National policies. At the time of trial, Cope had made a comparison between the Crowells' Liberty National medicare supplement policies and the Reserve National medicare supplement policy that the Crowells bought from Bailey. In Cope's opinion, the Liberty National policies had a few better provisions than the Reserve National policy, and the Reserve National policy had a few better provisions than the Liberty National policies. Basically, in Cope's opinion, "they wash out". Of crucial importance is that the Crowells had already served their waiting period for pre-existing conditions under the Liberty National policies. Based on Mr. Cope's observation, the Crowells did

not get any benefit in changing their insurance from Liberty National to Reserve National.

The replacement of the Crowells' Liberty National insurance by Reserve National occurred on the evening of September 2, 1988. After finishing supper, Bailey, the Crowells, and the McVays (relatives of the Crowells) went to the Crowells' living room and sat in a circle while Bailey got out his insurance forms and talked about what Reserve National had to offer. Myrtle told Bailey in the beginning that the Crowells had Liberty National medicare supplement policies. Myrtle told Bailey that she and Ray each were paying $43 a month for their separate policies for a total of $86. Bailey asked if the Crowells had been sick or in the hospital in the past two years. Myrtle told Bailey that Ray had been to the doctor the first day of August with a flare up of his prostate. She also showed Bailey Ray's medicine bottle that the doctors had prescribed for Ray's prostate problem. Myrtle told Bailey that she had a problem with her thyroid gland and that she was taking medication. The Crowells also told Bailey that Ray had a heart condition and that Ray had a light heart attack in May, 1980. Myrtle showed Bailey the medication that Ray was taking for that problem as well. The Crowells answered Bailey's questions truthfully.

Bailey told the Crowells that Reserve National had a pre-existing conditions benefit policy that the Crowells could take out but that the Crowells would have to pay an extra month's premium for this coverage. According to Bailey, this would cover the Crowells immediately for all pre-existing health problems, including Ray's prostate problems. Bailey told the Crowells that with their pre-existing conditions, they could have immediate coverage

which would be effective as of that day, meaning September 2, 1988.

Bailey then told the Crowells that the monthly premium for the Reserve National medicare supplement policy covering both Ray and Myrtle would only be $96.25 per month. This was approximately $10 more per month than what the Crowells had been paying on their two Liberty National policies. Bailey told the Crowells that the Reserve National policy would pay more and was a better policy than the Liberty National policies. He assured the Crowells that they would not have anything to worry about concerning the pre-existing conditions with Reserve National. He further emphasized that the effective date of the policy was September 2, 1988, the date of the application. Myrtle told Bailey that she and Ray did not have that much money and that the Crowells could not carry a Reserve National policy as well as their Liberty National policies.

Based on Bailey's statements that night, the Crowells paid Bailey $207.50 and purchased the Reserve National policy. The figure of $207.50 reflects two monthly premiums of $96.25 each plus a $15 registration fee. The Crowells did not have enough money to pay the $207.50. Myrtle had to borrow $96.00 from her brother Joe McVay to have the extra month's premium for the pre-existing condition coverage. McVay wrote a personal check to Reserve National for $96.00.

Bailey filled out an application for the Crowells on September 2, 1988. Ray signed the application. Bailey then took the application back, put it in his bag, got up, and started out the door. Bailey gave a receipt for the

$207.50 and told everyone that when he handed Myrtle the receipt the Crowells were covered.

Bailey admits that he told the Crowells that if they paid another month's premium that they would have immediate coverage. He further testified "I don't know to this date why I told them that". Bailey admitted telling the Crowells that not only would they get coverage effective immediately, but also that they would get coverage for pre-existing conditions if they paid an extra month's premium.

Bailey admitted that he must have known that the Crowells had Liberty National medicare supplement policies when he was there on September 2, 1988. He also told the Crowells on September 2, 1988 that the Reserve National policy would pay more benefits or cover more benefits than the Liberty National policies that they already had in effect. In fact, Bailey admitted at trial that the Liberty National medicare supplement insurance policies on Ray and Myrtle were basically identical to the Reserve National policy he sold the Crowells. He stated that there was not much difference in the policies at all.

Bailey purposefully and intentionally checked "No" to questions 5 and 6 on the Reserve National application which dealt with whether the Crowells had any existing health insurance in effect and whether the Crowells intended to replace or change any existing insurance policies in connection with the application being taken for Reserve National. Bailey admits that he should have checked "Yes" to these two questions on the application.

Bailey admitted that he told the Crowells that their monthly premium on the Reserve National policy would

be $96.25 a month although he knew at that time that there would be another $10.55 added to their monthly premiums. He knew on September 2, 1988 that their total correct monthly premiums would in fact be $106.80. This was over $20 more per month than the premiums they had been paying on their Liberty National policies. Despite this knowledge, Bailey told the Crowells that their monthly premiums would only be $96.25.

After Bailey left the Crowells' home, and without the knowledge of the Crowells, Bailey began processing their application. A summary report of application (SRA) was prepared by Bailey and sent to Reserve National's home office. On the SRA, Bailey clearly showed that the Crowells were paying $106.80 for pre-existing benefit coverage. Bailey also submitted to Reserve National's home office with the SRA a letter which read "Concerning Ray Crowell, I collected $111.25 in cash, and his brother Joseph McVay wrote me a check for $96 for the rider which eliminates waiting periods. Phillip M. Bailey". Bailey's letter, the SRA, and the Crowells' application were received by Reserve National in Oklahoma City on September 12, 1988.

Again without the knowledge of the Crowells, Jeffrey A. Reeves, an underwriter in Reserve National's home office handled the Crowell application. Reeves admitted that the documents received from Bailey indicated to Reeves that the Crowells desired pre-existing benefit coverage. He received this information on September 13, 1988. Reeves acknowledged that the documents reflected that the Crowells did not want any waiting period for pre-existing conditions on their policy. Reeves further

admitted that Bailey told him on October 17, 1988 that the Crowells were replacing existing insurance coverage.

With this knowledge, the Home Office of Reserve National intentionally issued a policy to the Crowells that did not have pre-existing condition coverage. Reeves admitted that Reserve National does issue policies different from what customers requested. Reeves admitted that he never tried to call the Crowells on the telephone nor did he try to contact them in any fashion to inform them that the policy issued by Reserve National did not cover pre-existing conditions.

As stated earlier, all the conversations and communications between Bailey, Reeves, and the home office of Reserve National that occurred in September and October, 1988 were without the knowledge of the Crowells. On October 14, 1988 Myrtle had a heart attack and was transferred on October 17th from her local hospital to Birmingham. She was in Birmingham from October 17th through November 9th. At the time of transfer, the hospitals needed her insurance policy numbers. Ray requested Joe McVay to contact Reserve National and get a policy number. McVay contacted Reserve National's Montgomery office and was referred to the Home Office in Oklahoma City. McVay was told by the Oklahoma City office that the Crowell policy had been approved, and he was given the policy number. McVay then gave the policy number to Ray for filing with the hospitals. This was all done on October 17, 1988.

The Crowells received their Reserve National policy through the mail on November 15, 1988. When Myrtle skimmed through the policy, she noticed that the effective

date was wrong. It showed an effective date of November 3, 1988. Myrtle thought that the effective date should have been September 2, 1988 (the date of application) based on what Bailey had told them. Myrtle called the Home Office of Reserve National on November 15, 1988 and talked with a Mr. David Harvey. Myrtle told Harvey that she had received her policy that day and that the effective date was not correct. Harvey wanted to know why it was not correct and Myrtle told him that she had paid an extra premium for her policy to go into effect immediately and have pre-existing conditions coverage. Harvey told Myrtle that the extra premium that she paid was for pre-existing conditions coverage but that she had immediate coverage. Myrtle believed him. In reliance on what Mr. Harvey told Myrtle, she kept paying the premiums to Reserve National.

During the course of their November 15, 1988 conversation, Myrtle told Harvey about her heart problem and that she needed coverage for that. Myrtle also told Harvey that her other policy that she had with another company had lapsed in early October. Harvey admitted that Myrtle told him that she had a heart attack in mid-October and that she thought she was covered by her Reserve National policy. Harvey also admitted that Myrtle told him that it was her understanding that she had immediate coverage. Harvey admitted that Myrtle told him that she had let her old policy lapse. Harvey assumed that Myrtle was told by her agent that she would be covered immediately. Harvey reported this telephone call from Ms. Crowell to his supervisor, Ms. Phelps, because Ms. Crowell thought she had coverage,

and she did not. Harvey read his notes of his conversation with Myrtle to Ms. Phelps word for word. Harvey did not recall how Ms. Phelps responded.

After talking with Harvey, Myrtle received a sheet of paper from Reserve National with the date October 3, 1988 on it. She paid the Crowells' premium in November and December on the Reserve National policy. On January 11, 1989, Ray's prostate gland gave him problems, and he had to have surgery. The Crowells gave the hospital Ray's Reserve National insurance card. The hospital filed claims which were denied by Reserve National in May, 1989. The Crowells received two letters denying the claims saying the denial was for "pre-existing conditions". Myrtle and Ray continued paying their premiums every month and asked the hospitals to refile hoping that Reserve National would pay.

In September or October, 1989, the Crowells got a letter from the Credit Bureau based on Ray's medical bills not being paid. Myrtle called Dorothy Ziglar, her daughter, for help. It is stipulated by the parties that $875.01 would have been paid under Reserve National's policy if pre-existing benefit coverage would have been in existence. After learning that the doctor bills had not been paid by Reserve National and that the claims had been denied and after receiving collection letters, Myrtle became awfully nervous, stressed, strained and real shaky. Her legs were like jelly, and she had to sit down.

At the request of her parents, Dorothy Ziglar telephoned Reserve National on October 23, 1989. Dorothy asked for Dave Harvey who her mother had talked with 11 months earlier in November, 1988. Dorothy told

Harvey that Ray and Myrtle had paid an extra month's premium to get this coverage for pre-existing conditions. Harvey said that he only had proof that Ray and Myrtle had initially paid for one month. He told Dorothy to send proof of an extra payment. During the conversation, Dorothy told Harvey about her Uncle Joseph McVay writing a check and the receipt for monies that was left with her parents.

Dorothy identified Plaintiffs' Exhibit #32, a copy of the letter she wrote to Harvey. The letter reflected the discussion that Dorothy had with Harvey. The letter identified the agent, Phillip Bailey, of Montgomery, Alabama. Dorothy knew the agent's name while talking with Harvey on the phone. The letter repeated Dorothy's conversation with Harvey concerning the Crowells' payment of the extra month's premium to waive the six month waiting period for pre-existing conditions. The letter also confirmed that the Reserve National policy replaced another medicare supplement policy. Dorothy stated that, when she told Harvey this on the phone, he said that if the Crowells had paid the extra month's premium, they were covered but that he only had proof of them paying one month. Harvey said that he did know that it replaced another policy. Dorothy wrote the letter and gave it to her mother to put with the necessary attachments and mail to Reserve National. Harvey, or someone else from Reserve National, was to get back with Dorothy after receiving her letter.

Dorothy waited for a period of time after her letter and proof were mailed to Reserve National. After hearing nothing, she called back to Oklahoma City two or three times. She used the 800 number that Harvey had given

her. She talked with Harvey briefly a second time before he transferred her call to some unknown lady. Harvey admitted during this second conversation that he had received Dorothy's letter and things that he requested but that he had not heard anything else about the matter.

Dorothy told the lady to whom Harvey transferred Dorothy's call that she thought the bills should be paid. Neither the lady nor Harvey ever called Dorothy back. No one from Reserve National ever wrote or called Dorothy concerning her parents' situation.

Testimony was given by Ms. Louise Paulk and Ms. Barbara Mock concerning other instances where agents of Reserve National had misrepresented pre-existing benefit coverages. Ms. Paulk testified that she had been told by a Reserve National agent that the policy she was buying had pre-existing condition benefit coverage. When she filed her claim for benefits, it was denied by Reserve National which stated that conditions on which the claim was filed pre-existed the issuance of the policy. When her claim was denied, Ms. Paulk contacted the Home Office of Reserve National and told the people that her agent had told her that she was covered for her pre-existing health conditions by having paid premiums "three months in advance". After telling the Home Office this, Reserve National still did not pay her claims. Similar testimony was given by Ms. Mock.

At trial, Defendant Bailey admitted that although he was no longer employed by Reserve National, all his costs of defense including his present attorney fees were being paid by Reserve National. The jury awarded compensatory damages in the amount of $25,000 and punitive

damages in the amount of one million dollars against both Defendants. The trial court entered judgment in that amount.

B. POST-TRIAL PROCEEDINGS

Post-trial motions for new trial and judgment notwithstanding the verdict were filed by both Defendants. The trial court set a date for presentment of evidence by the parties on these motions. At the time of the hearing, Reserve National presented no evidence but merely argued its positions. Bailey did present evidence concerning his financial net worth. Thereafter, the trial court affirmed the compensatory award of $25,000 as to both Defendants. The trial court granted a new trial to Reserve National in the event the Crowells refused to accept a remittitur of the one million dollar punitive damage verdict to $600,000. The trial court also remitted the punitive damage verdict from one million dollars to $250,000 as to Bailey. The trial court stated that it found no pattern or practice of wrongdoing on the part of Bailey. The Crowells accepted the remittiturs of the trial court. An amended judgment was thereafter entered by the trial court.

Reserve National and Bailey appealed the trial court's rulings. The Crowells cross-appealed the issue of remittitur. On February 5, 1983 the Supreme Court of Alabama affirmed the trial court's decision in all respects. Reserve National filed an application for rehearing which was denied on March 19, 1993. On April 2, 1993 this Court granted Reserve National's application for stay of judgment of the Supreme Court of Alabama pending the

filing and review of Reserve National's Petition For A Writ Of Certiorari.

SUMMARY OF ARGUMENT

The Supreme Court of Alabama carefully reviewed the facts of this case as presented to the jury, as well as the trial court's post-trial order. Both the trial court and the Supreme Court of Alabama found that the facts in this particular case mandated a punitive damage judgment of $600,000.00. Both courts found there to be no constitutional violation of Petitioner's Due Process Rights.

Based on the particular facts of this case, the punitive damage award of $600,000.00 should not be overruled or reviewed further. The Alabama trial and appellate courts have provided Petitioner with Due Process guaranteed under the Constitution of the United States. Petitioner has benefited by the reduction of the original jury verdict as a result of Alabama's procedure followed by the trial and appellate courts in reviewing punitive damage awards.

United States Supreme Court Rule 10.1(c) is applicable to this Court's decision as to whether the Petition For A Writ Of Certiorari should be granted. There are no special or important reasons why this Court should exercise its judicial discretion to grant this petition. This Court has already approved the procedure followed in Alabama for review of punitive damages awards. Contrary to the assertion made by Reserve National, the trial court and Supreme Court of Alabama have followed this procedure. A jury verdict for punitive damages of one

million dollars has been reduced to $600,000 by the Alabama courts. Reserve National wants the verdict reduced more. Reserve National no longer contests the fact that its conduct gave rise to punitive damages in this case. Reserve National merely seeks relief in the form an additional remittitur. This is not a case in which this Court should exercise its judicial discretion by granting the Petition For A Writ Of Certiorari.

ARGUMENT

I. THE SUPREME COURT OF ALABAMA HAS FOLLOWED ALABAMA'S PROCEDURE FOR REVIEWING PUNITIVE DAMAGE VERDICTS AS APPROVED IN *HASLIP.*

This Court in *Pacific Mutual Life Insurance Company vs. Haslip,* 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), ruled that Alabama's procedure for awarding punitive damages as well as post-verdict review, met the requirements of Due Process under the Fourteenth Amendment to the United States Constitution. The present case was tried after this Court's ruling in *Haslip* and under Alabama's new "Tort Reform" statutes. See Ala. Code § 6-11-20 (1975) (as amended) *et seq.* Under *Haslip,* the plaintiff was only required to meet a standard of proof for punitive damages based on the "preponderance of the evidence". In the present case, the Crowells were required to meet the higher standard of "clear and convincing evidence" of fraud by Defendants. This standard requires proof greater than a preponderance of the evidence or even the substantial weight of the evidence. Ala.

Code § 6-11-20(b) (4) (1975) (as amended). Additionally, the Crowells had the burden of showing that Reserve National was guilty of a pattern or practice of intentional wrongful conduct in order to exceed the legislatively created punitive damage "cap" of $250,000.00. Ala. Code § 6-11-21 (1975) (as amended). As noted in both the trial court's post-trial order and the Supreme Court of Alabama's opinion, this pattern and practice of intentional wrongful conduct was clearly proven.

Reserve National states in its brief that the Alabama courts refused to address Reserve National's Federal Due Process challenges and failed to adhere to Alabama's procedures for reviewing punitive damage verdicts. See Applicant's Petition For A Writ Of Certiorari, page 10 sub-topic A. This statement is not true.

Judge Phelps composed a lengthy order in which he discussed the directives and factors as outlined in *Green Oil Company vs. Hornsby,* 539 So.2d 218 (Ala. 1989) and *Hammond vs. City of Gadsden,* 493 So.2d 1374 (Ala. 1986). Appendix A These are the same standards which this Court approved in *Haslip.* Further, the trial court specifically found that its review of the punitive damage award in this case was in keeping with the ruling of this Court in *Haslip.* Appendix A, App. 16 As a result of this post-verdict review, the trial court *reduced* the punitive damage award from one million dollars to $600,000.00. Although the Crowells disagreed with but accepted the remittitur, the Crowells nevertheless recognize that Reserve National was entitled to a fair and impartial post-judgment review which it received and which resulted in a reduction of the punitive damage award by 40%.

Reserve National accuses the Supreme Court of Alabama of refusing to adhere to Alabama's procedures for reviewing punitive damage verdicts. Once again, this charge is false. Note the language of the Alabama Supreme Court in its opinion:

> We now address, in tandem with the following issue, the contention that the judgment was excessive even after the remittitur.
>
> On cross-appeal, the Crowells request this Court to reinstate the jury's $1,000,000 punitive damage award. Absent a finding that the remittitur was not supported by the directives of *Green Oil* and *Hammond, supra,* we will not do so. We have carefully examined the trial court's analysis of the amount of punitive damages, and we conclude that the court properly ordered a remittitur of $400,000.00 under the guidelines of *Green Oil* and *Hammond.* In setting aside the $1,000,000 verdict as flawed, the trial court recognized the fundamental, constitutionally guaranteed right to a trial by jury. Ala. Const. of 1901, art. I, § 11. Based upon the *Hammond* and *Green Oil* directives, a thorough review of the facts of this case, and a review of the amount of punitive damages awarded in other cases, the trial court determined that the jury's verdict went beyond the amount necessary to accomplish society's goal of punishment and deterrence, and it ordered a remittitur of $400,000. We cannot say that the trial court abused its discretion in so doing, and, therefore, we affirm the order of remittitur.
>
> *Reserve National Insurance Company vs. Crowell,* 614 So.2d 1005, 1010 (Ala. 1993)

If one would simply read the post-trial order and opinion, it is clear that the trial court as well as the Supreme Court of Alabama followed the procedure for review of punitive damage verdicts which has been approved by this Court in *Haslip*. Only if this Court is ready to overrule *Haslip* and find that Alabama's procedure for post-judgment review of punitive damage awards is unconstitutional should this Court even consider the granting of Reserve National's petition. The facts are clear from the record that Reserve National received a full and fair hearing under the constitutionally sound *Green Oil* and *Hammond* standards both at the trial court as well as appellate court level. Reserve National simply disagrees with the ruling of the Alabama courts on the amount of punitive damages.

II. THE SUPREME COURT OF ALABAMA HAS REFUSED TO ADOPT A "MATHEMATICAL BRIGHT LINE" BETWEEN CONSTITUTIONALLY ACCEPTABLE AND CONSTITUTIONALLY UNACCEPTABLE PUNITIVE DAMAGE VERDICTS.

In its brief, Reserve National recognizes the fact that this Court in *Haslip* stated that a "bright line" as to the amount of punitive damages cannot be drawn where it would be applicable in every case. This Court ruled:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.
>
> 111 S.Ct. at page 1043

In its application for rehearing to the Supreme Court of Alabama, however, Reserve National argues its ". . . disparity of the relationship of actual loss to punitive damage . . . " position. Reserve National contends that because of this Court's language in *Haslip* stating that the ratio of punitive damages to compensatory damages and/or out of pocket expenses was "close to the line", then certainly the punitive damage to compensatory and/or actual loss ratio in the present case is "over the line". Using a "back door argument", Reserve National is attempting to require the courts in Alabama to add an additional factor not authorized by *Green Oil* or *Hammond,* i.e. the punitive damage to compensatory damage award must not exceed a certain ratio with that particular ratio being something at or near the ratio of damages in *Haslip.*

This Court was careful in *Haslip* to rule that no mathematical bright line ratio could ever be established that would fit every case. This Court did not require in *Haslip* that the case be remanded to the Supreme Court of Alabama to consider this alleged "additional" ratio factor as argued by Reserve National. Indeed, the Alabama Supreme Court has rejected such an argument in *Associates Financial Services Company of Alabama vs. Barbour,* 592 So.2d 191 (Ala. 1991).

Reserve National is requesting this Court to either adopt for itself or require the Supreme Court of Alabama to adopt a "mathematical equation" that will place another "cap" on the amount of punitive damages which may be awarded in Alabama. Such a request should be addressed to the state's legislature as it was done in

Alabama's last legislative session. Fortunately for Alabama, the proposed legislation requiring a mathematical equation was defeated. In 1987, the Alabama Legislature spoke to the issue of punitive damage "caps". Those particular statutes were applied in the present case and in fact resulted in a reduction of the punitive damage award against the individual Defendant Phillip Bailey. Reserve National, however, because of its history of fraudulent conduct in other cases, did not fall within the protection of the $250,000.00 cap. Because Reserve National continues to perpetrate fraud on the citizens of Alabama, it desires for this Court to provide further protection to it in the form of a judicially created mathematical equation.

One of the purposes of punitive damages in Alabama is to deter intentional wrongful conduct. Sometimes, the intentional wrongful conduct is likely to produce little harm. On other occasions, the intentional wrongful conduct may be likely to produce great harm but in fact may only result in slight harm. Reserve National contends that the "actual losses" of unpaid medical expenses of $875.01 ($1202.09 with accrued interest as of February 15, 1991) is in fact "slight" harm to the Crowells. To Reserve National, $875.01 is very little money. To the Crowells, who are on fixed incomes and who had to borrow from their relatives a portion of the initial premium paid to Reserve National, $875.01 is a significant sum of money. Additionally, how can Reserve National contend that the "actual losses" in this case are only $875.01? The actual losses suffered by the Crowells were significantly more than monetary. The Crowells received collection letters and damage to their credit as a result of the unpaid medical bills. They became stressed and strained. Ray

Crowell, a husband of over 52 years, became "short" with his wife because of the financial stress they were under. This stress still continues even until today. The jury found compensatory damages to be $25,000. As of today, Reserve National has still not even paid the compensatory damage portion of the judgment.

The first factor in *Green Oil* for reviewing a punitive damage award states:

> Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
>
> 539 So.2d at page 223.

In applying this factor to the present case, the trial court could not have stated it any better:

> This case involved misrepresentations with regard to Medicare Supplement medical insurance. The policyholders were elderly and subject to being mislead. It is entirely foreseeable that elderly persons would be involved with Medicare Supplement insurance and that such older people could be easily mislead. The court finds that the harm to insureds, such as shown by the facts of this case, is grievous and, therefore, damages should be high.
>
> Appendix A App. 11

The trial court's decision later affirmed by the Supreme Court of Alabama was that $600,000.00 in punitive damages bore a reasonable relationship to the harm that was likely to occur and which in fact did occur in this case.

Finally, it is important to note that this punitive damage judgment, based on what was presented to the trial court and the Supreme Court of Alabama, will not have any significant adverse financial impact on Reserve National. When given the opportunity at the post-trial hearing, Reserve National chose not to put on any evidence that even a one million dollar verdict would have a significant financial impact on it. Even at the appellate court level, Reserve National never proffered evidence or argument that the remitted punitive damage award of $600,000.00 would have an adverse financial impact. This point is argued because Reserve National has been guilty of other frauds in the past against Alabama citizens. On these other occasions, the settlement amounts were relatively small. Finally, Reserve National had to stand before a jury in Alabama and be judged for its wrongful conduct. Even Reserve National, however, is unable to argue that the punitive damage award in this case will have a significant impact on its financial position.

CONCLUSION

Respondents Crowells request this Court to enter an order denying the Petition For A Writ Of Certiorari filed by Petitioner Reserve National Insurance Company. Respondents Crowells further request this Court to enter an order lifting the stay of the judgment rendered by the

Supreme Court of Alabama, said stay having been filed on April 2, 1993. Further, Respondents Crowells request any relief to which they may be entitled with regards to the taxing of costs in opposing this petition.

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APPENDIX TO THE BRIEF OF RESPONDENTS RAY CROWELL AND MYRTLE CROWELL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

APPENDIX A

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

RAY CROWELL and MYRTLE CROWELL, Plaintiffs, VS. PHILLIP BAILEY and RESERVE NATIONAL INSURANCE CO., Defendants.	)	CASE NO. CV-90-1863

ORDER

This case is before the Court at this time on separate Motions for Judgments Notwithstanding the Verdict, or In the Alternative for New Trials, or In the Alternative for Remittitur filed respectively on behalf of Defendants, Phillip Bailey and Reserve National Insurance Company. On this submission, this Court has reviewed portions of the transcript of testimony, the Court's oral charge, and the briefs and argument of counsel.

The case involves allegations of legal fraud against both defendants stemming from alleged misrepresentations with regard to a Medicare Supplement medical insurance policy. The jury returned a verdict of $25,000 Compensatory and $1,000,000 Punitive.[1]

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[1] "We, the Jury, find the issues in favor of the Plaintiffs, Ray Crowell and Myrtle Crowell, and against both defendants, Phillip Bailey and Reserve National Insurance Co., and assess their damages as follows:

The evidence at trial was that Phillip Bailey went to the home of Ray and Myrtle Crowell on September 2, 1988 with regard to the sale of Medicare Supplement medical insurance. At that time, the Crowells already had this coverage with Liberty National Insurance Company. Mr. Bailey admitted at trial that at the time he sold the Reserve National Insurance policies to the Crowells, he knew that they already had the Liberty National Medicare Supplement policies and that he was told by the Crowells that they would be replacing these policies. Mr. Bailey still wrote on the application that they were not replacing coverage. Bailey admitted that he told the Crowells that upon payment of prescribed premiums they would have immediate coverage for any and all pre-existing conditions. The Crowells, in reliance on the representations made by Bailey, bought the Reserve National policy and thereafter dropped the Liberty National policies. After this, Reserve National told the Crowells that instead of a monthly premium of $96.25 as originally stated, the correct monthly premium would be $106.80.

Even though Bailey knew the Crowells had Liberty National Medicare Supplement Policies that were replaced by the Reserve National coverage, he checked

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$25,000	Compensatory
$1,000,000	Punitive
$1,025,000	TOTAL"

Note: The Court submitted alternate verdict forms to the Jury in accord with Section 37.05, Alabama Pattern Jury Instructions. June 1990, Supplement. See explanation as contained in Court's oral charge.

the question regarding "Policies In Force and Replacement – No". Mr. Bailey chose not to write on the application anything about Ray Crowell's pre-existing prostate condition even though the evidence was without dispute that the Crowells informed him of this pre-existing condition. Mr. Bailey did not obtain an executed replacement form even though he knew the Crowells were replacing their Liberty National Medical Supplement Policies when they purchased the Reserve National Medicare Supplement policy.

The Crowells permitted their Liberty National policies to lapse by choosing not to pay the premium. These Liberty National policies lapsed on October 1, 1988.

Ray Crowell had prostate surgery during a hospitalization that continued from January 11 through January 14, 1989. Upon claims being filed by Ray Crowell, Reserve National sent two (2) denial letters to Ray and Myrtle Crowell denying Ray Crowell's claims for the prostate operation because of the pre-existing prostate condition. These letters were dated May 8 and May 17, 1989. It was without dispute that Phillip Bailey failed to include in the Crowell's original application for the Reserve National policy anything about Ray Crowell's prostate condition, even though he had knowledge of this.

The Defendants claim that a new trial should be granted or a judgment entered notwithstanding the verdict or a remittitur granted in that the Court erred in submitting the issue of punitive damages to the jury; in submitting the claim of mental anguish to the jury; and, in allowing Plaintiffs to introduce evidence of other

alleged frauds involving other insureds. Defendants further contend that the court erred in permitting Plaintiffs to introduce evidence that Reserve National was paying for the legal defense and hotel accommodations for Phillip Bailey and further that the award of $1,000,000 in punitive damages under the facts of this case is excessive and should be subject to the limitation provision of Title 6-11-21,[2] *Code of Alabama,* 1975. The Defendants further contend that the award of punitive damages under the current posture of Alabama Law is violative of the Constitution of the State of Alabama and the Constitution of the United States.

Upon review of the Record and upon the Court's own recollection, this Court finds that there was ample evidence upon which the jury could have found the Defendants liable for willful, reckless, fraudulent misrepresentations within the provisions of Title 6-5-101, et seq. *Code of Alabama,* 1975. The Court thoroughly charged the jury from the Alabama Pattern Jury Instructions 18.00 et seq. and in accord with the statutory law of the State of Alabama pertaining to fraudulent conduct. There was substantial evidence as to willful, reckless fraud by both of the Defendants as well as deceit and suppression of the truth.

The issue of mental anguish was properly submitted to the jury. There was ample evidence from both Ray and Myrtle Crowell that they lost sleep, were nervous, argued more than they had in the past, suffered anxiety and

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[2] Defendants contend that the limitation should be applicable to both defendants or a new trial granted, since in Alabama damages cannot be apportioned between joint tortfeasors.

distress over the nonpayment of their medical bills as a result of Reserve National's fraud, they received dun letters from several medical providers and that this had worried them considerably. The Court gave detailed instructions with regard to mental anguish as a part of compensatory damages. See *Holcombe v. Whitaker*, 294 Ala. 430, at p. 433-434; and *Fidelity & Casualty Co. v. J. D. Pittman Tractor Co.*, 244 Ala. 354, at p. 358 (Ala. 1943). Specifically, the Court charged the jury as follows:

> "You are entitled to consider medical bills not paid, you are entitled to consider the law that says the general measure of recovery for fraud includes all damages within the contemplation of the parties or which are the necessary and natural and proximate consequence of the wrong. It's up to you all to determine what was in the contemplation of these parties, including if you are reasonably satisfied that mental anguish, worry, anxiety was in the contemplation of these parties, with that standard, that would be up to you, and if you are reasonably satisfied that mental anguish, worry, anxiety was in the contemplation of these parties, that they were the natural and consequences of this alleged wrong, then you would be entitled to consider that in your compensatory damages, to reasonably and fairly pay somebody for what they have lost or what they have been through.

Pursuant to § 6-11-21, *Code of Alabama*, 1975, an award of punitive damages cannot exceed $250,000.00 unless the award is predicated on one or more of the following:

> "(1) A pattern or practice of intentional wrongful conduct, even though the damage or

injury was inflicted only on the plaintiff; or,

(2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or,

(3) Libel, slander or defamation. (Acts 1987, No. 87-185, p. 251, §2.)"

The actionable misrepresentations by Phillip Bailey all occurred on September 2, 1988. These misrepresentations were made at the Crowells' house during the initial meeting between Phillip Bailey and the Crowells, at which time the application for insurance was filled out. The misrepresentations of Bailey each involved legal fraud. The evidence insofar as the misrepresentations of Bailey are concerned does not establish a continuous pattern or practice of "temporally separate" conduct within the provisions of §6-11-21. *Youngblood v. Lawyers Title Ins. Corp.*, 746 F.Supp. 71 (S.D. Ala. 1989). The Court does not find that the conduct of Bailey falls within any of the statutory exceptions to the $250,000.00 limitation.

There was evidence that the corporation, through employees and agents other than Bailey, did in fact follow a pattern or practice of intentional wrongful conduct with regard to the Plaintiffs and to other insureds insofar as the handling of pre-existing conditions. Specifically, on November 15, 1988, Myrtle Crowell spoke with David Harvey of Policy Service at the Home Office of the Company. Harvey restated to Mrs. Crowell the earlier misrepresentation of Bailey:

"The extra month's premium of $96.25 was for pre-existing benefit coverage." (See Plaintiffs' Exhibit 10).

The evidence establishes that this misrepresentation was made to Ms. Crowell at a time when the Home Office file contained information and facts indicating that the truth had not been told to the Crowells as to the policies they had purchased.

On October 23, 1989, Dorothy Zeigler, the Crowells' daughter, had a conversation with David Harvey regarding the denial of the claims. Dorothy Zeigler specifically told Mr. Harvey at that time of the misrepresentation made to her mother and father by Agent Bailey. Mr. Harvey told her to put this information in a letter and attach the applicable documents. On October 31, 1989, Reserve National received the letter from Dorothy Zeigler which restates the misrepresentation made to the Crowells by Agent Bailey, and specifically, the misrepresentation regarding pre-existing conditions. Reserve National did not respond to this letter. Thereafter, on February 23, 1990, Agent Phillip Bailey was relicensed and appointed by Reserve National to represent the Company in the selling of policies throughout the State of Alabama.

The evidence with regard to other insureds, Mrs. Paulk and Mrs. Mock, show that other agents of Reserve National misrepresented the truth to them regarding pre-existing condition coverage. [As to the admissibility of this evidence, see *Winn Dixie Montgomery, Inc. v. Henderson*, 395 So.2d 475 (Ala. 1981)].

The Court thus finds that the misconduct of Reserve National does, in fact, fall within the "pattern or practice of intentional wrongful conduct" exception, to the $250,000.00 limitation of punitive damages, i.e.

§6-11-21(1). The Court further finds that under the facts and circumstances of this case there was evidence of wrongful conduct of other agents of Reserve National in addition to Agent Bailey, which does show a "pattern or practice of intentional wrongful conduct"; thus, the legislatively imposed limitation on the award is not applicable here to the corporation.

This Court recognizes that historically the law in Alabama has been that damages cannot be apportioned between joint tortfeasors. However, in 1987 the legislature enacted the $250,000.00 limitation when one or more specified conditions are shown. Applying this statutory limitation to the facts of the instant case, this Court is of the opinion and finds that the application of the legislatively imposed limitation on the award against Agent Bailey is required. The "lump sum verdict" will stand subject to the remittitur hereinafter imposed. However, as to Agent Bailey, the Plaintiffs are entitled to collect up to $250,000.00 pursuant to the provisions of §6-11-21. No such statutory limitation applies to Reserve National.

The position of Reserve National throughout this case has been that Mr. Bailey was mistaken in his representations to the Crowells as to pre-existing condition coverage. The Company has consistently insisted that Bailey's conduct did not show intentional or willful fraud, deceit, or suppression of truth. The tendencies of Agent Bailey's testimony was consistent with the defense of Reserve National. Plaintiffs, over the Defendants' objections, were permitted to show that the Defendant, Reserve National, was paying the legal defense for Bailey and for his hotel accommodations during trial. The Court admitted this testimony on the limited issue as to bias on

the part of the witness. The Court gave the jury the following detailed limiting instruction:

> "Ladies and gentlemen, this is going to be admitted on a limited basis as far as payment, supplying this witness, this party with legal counsel, is going to be admitted before you for the limited purpose for you to use in whatever way that you deem appropriate to use it, as far as this witness's credibility. It's not admitted as substantive evidence, but it's admitted for whatever weight you want to give, if any, to the credibility of this witness, and whether he has any reason because of this supplying, alleged supplying of legal representation, whether that affords any basis to this witness to slant his testimony this way or that way. For that limited purpose, not for the substantive purpose, but for evidence of credibility or what the law calls bias, it's admitted for that limited purpose, for whatever weight if any that you all want to give to it."

An outside the presence of the jury hearing was held as to the admissibility of this evidence. This Court stated on the Record to counsel from *"McElroy's Alabama Evidence"* the following:

> "Whenever the trial court is faced with the admissibility of a question asked to elicit bias or the introduction of evidence showing bias, the better course seems to be that the court should rule for admission. A study of the decisions, for example, shows that nearly all reversals of trial rulings on offers of proof of a witness' bias have resulted from the rejection, rather than the reception, of the offered proof. That's one forty-nine point oh one, paren three of *McElroy*." See

McElroy's Alabama Evidence, §149.01 at Pg. 310, (3rd Ed. 1977), and Cases Collected *Alabama Digest*: Witnesses Key Number 363 et seq.

The common thread throughout all of the cases seems to be that the Court is afforded great latitude in determining the admissibility of evidence on the issue of bias. The Court finds that the evidence of Reserve National paying Bailey's legal expenses and for his hotel accommodations during trial was property [sic] admitted on the question of bias and as explained to the jury.

The law of punitive damages was thoroughly explained to the jury by virtue of the latest supplement to the *Alabama Pattern Jury Instructions* by reading in its entirety Alabama Pattern Jury Instruction 11.03 (Amended) – Punitive Damages. The Court also read §6-11-20, *Code of Alabama*, 1975, to the jury in its entirety. The Court clearly explained to the jury that punitive damages may not be awarded unless the plaintiff proves "by clear and convincing evidence" that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff' The definitions of fraud, wantonness and malice were given both from Alabama Pattern Jury Instruction 11.03 (Amended) and again from §6-11-20.

The Court explained the dual purpose of punitive damages, . . . by stating:

> " . . . the purpose of awarding punitive or exemplary damages, punitive or exemplary, to punish and to make an example of someone, is to allow a money recovery to the plaintiff by way of punishment of the defendant, and for the added purpose of protecting the public by deterring

the defendant and others from doing such wrong in the future."

The Court charged the jury as to the definition of "clear and convincing" both from Amended 11.03 of the *Alabama Pattern Jury Instructions* and from §6-11-20, Code of Alabama, 1975.

As the Court noted in writing on the Defendants' requested charges with regard to punitive damages, all of these charges were thoroughly and completely covered by reading the entire Alabama Pattern Jury Instruction charge, that is, Amended 11.03, and also by reading §6-11-20 in its entirety.

The Court will now review the issue of whether the punitive damages awarded herein were excessive. In doing so, the Court will follow the directives of the Supreme Court of Alabama as outlined in *Green Oil Company v. Hornsby,* 539 So.2d 218 (Ala. 1989), and *Hammond v. City of Gadsden,* 493 So.2d 1374 (Ala. 1986).

1. *THE HARM LIKELY TO OCCUR AND THE HARM THAT ACTUALLY OCCURRED.*

This case involved misrepresentations with regard to Medicare Supplement medical insurance. The policyholders were elderly and subject to being misled. It is entirely foreseeable that elderly persons would be involved with Medicare Supplement insurance and that such older people could be easily misled. The Court finds that the harm to insureds, such as shown by the facts of this case, is grievous and, therefore, damages should be high.

2. *THE DEGREE OF REPREHENSIBILITY OF DEFENDANTS' CONDUCT.*

The evidence shows that Defendant Bailey told Mr. Crowell that he was covered for his pre-existing prostate condition. The required premiums were paid. The Company continued to conceal the truth and to misrepresent the facts of no coverage to the Plaintiffs. The Defendant, Reserve National, had engaged in similar misrepresentations with regard to pre-existing conditions in the past.

3. *PROFIT.*

It was without dispute that additional premiums were charged for coverage that the Plaintiffs did not receive. Defendants charged and received these premiums but refused to pay benefits. The Court notes that ultimately Reserve National did pay the amount of Mr. Crowell's hospital and medical bills into Court.

4. *FINANCIAL POSITION OF THE PARTIES.*

The Defendant, Reserve National, did not take a position in Court that the award of $1,000,000 would place them in receivership or bankruptcy. Mr. Bailey did, however, take the position that the amount of $1,000,000 would ruin him. The Court notes that as hereinabove stated the award against Mr. Bailey is subject to the limitation imposed by §6-11-21.

5. *COST OF LITIGATION.*

The Court is aware that Plaintiffs incurred a great deal of expense in preparing this case. The Court takes judicial note that litigation of this nature is costly with depositions being taken throughout the country. Accordingly, the Court

finds that the verdict should be high enough to enable Plaintiffs, such as these, and their attorneys, to pursue this type of case.

6. *CRIMINAL SANCTIONS.*

There has been no evidence produced that criminal sanctions have been imposed upon either Reserve National or Agent Bailey for their conduct in connection with this matter. There were two other settlements in cases similar to this and as pointed out by the Defendants; the case of *Paulk v. Reserve National* settled for $14,000.00 and *Mock v. Reserve National* settled for $18,000.00. Neither of these cases show that the Company has been subjected to substantial punitive damages for exemplary purposes or for punishment.

7. *CIVIL ACTIONS.*

The aforementioned cases of *Paulk* and *Mock* are the only other civil actions that have been introduced here against Reserve National. Again, neither of these settlement awards evidence exemplary or punitive damages such as would be justified by the enormity of the wrong with regard to misrepresentations of coverage in regard to pre-existing conditions.

Our Supreme Court has repeatedly held that punitive damages need bear no particular relationship to the amount of compensatory or out-of-pocket expenses. In its *Hammond* order, the trial Court followed this basic guideline:

> "Punitive damages should not exceed an amount necessary to accomplish society's goals of punishment and deterrence, but the degree of punishment necessary to achieve those goals changes with each case." *Central Alabama Electric*

Cooperative v. Tapley, 546 So.2d 371, 377 (Ala. 1989).

From reviewing many cases on the subject of alleged excessiveness in punitive damages, the Court is reminded that a trial by jury is a fundamental, constitutionally guaranteed right, Art. I, §11, Const. of 1901, and, therefore a jury verdict may not be set aside unless the verdict is flawed, thereby losing its protection. In *Hammond*, the Court held that a jury verdict may be flawed in two ways.

> "First, it may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure. In these situations, a trial court may, and should, reduce or increase the amount of the verdict to reflect the amount to which the parties are entitled as a matter of law. Second, a jury verdict may be flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive."

The Supreme Court recently held in ordering a remittitur in the case of *General Motors Corporation v. Helen Lewis Johnston*, January 24, 1992, as follows:

> "The presumption of correctness of a jury verdict can be overcome only by a *clear* showing that the amount of the award is excessive." *Green Oil Co.*, 539 So.2d 218 (emphasis added). "It is well understood that in considering the adequacy or excessiveness of a verdict, each case must be determined on its own facts, and that neither the trial court, nor this Court, may

> substitute its judgment for that of the jury." *Green Oil Co.*, 539 So.2d at 222, citing *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988); *Hammond*, 493 So.2d 1374.

The Supreme Court in *Green Oil Co. v. Hornsby*, supra, held:

> "Bearing in mind that punitive damages must not exceed an amount that will accomplish society's goals of punishment and deterrence, *it is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of those goals.*" (Emphasis Added).

Based upon a thorough review of this case, and of the amount of punitive damages in other cases, this Court is of the opinion that the punitive damages award in this case is excessive and the Court orders a remittitur of $400,000. Even though the Court determines a remittitur to be necessary, the Court is of the opinion and finds that the evidence supports a punitive damages award of $600,000. The determination of excessiveness is based upon applying the law of *Hammond* and *Green Oil* that punitive damages should not exceed an amount necessary to accomplish society's goal of punishment and deterrence for the facts and circumstances of this case. This Court finds that an award of $600,000 will accomplish society's goals of punishment and deterrence and is the degree of punishment necessary to achieve the goal set forth in *Hammond* and *Green Oil Co.*, supra.

Finally, the Defendants contend in the motions *sub judice* that an award of punitive damages under the current posture of Alabama Law is violative of the Constitution of the State of Alabama and the Constitution of the United States. This issue was decided contrary to the Defendants' position in the case of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

Accordingly, it is considered ORDERED, ADJUDGED and DECREED by the Court as follows:

1. The Motions of both Defendants are overruled as to the $25,000 award of compensatory damages.

2. The Plaintiffs are entitled to recover up to $250,000 in punitive damages from the Defendant, Phillip Bailey, in accord with the provisions of §6-11-21, *Code of Alabama*, 1975.

3. The Motion of Reserve National Insurance Company for a New Trial is overruled subject to the acceptance by the Plaintiffs of a remittitur of $400,000 within twenty-eight (28) days from the date of this Order.

4. The Motions in all other respects be, and the same are hereby overruled.

DONE this 4th day of March, 1992.

/s/ Joseph D. Phelps
JOSEPH D. PHELPS,
CIRCUIT JUDGE

cc: Steve Schmitt
Clay Hornsby
Phil Butler
Jim Garrett